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NO. 80-1721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

M. RANDALL PEEK,

Petitioner,

v.

ERNEST BILLY FITZGERALD

and

MARILYN FITZGERALD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Respondents do not accept the statement of the case presented by petitioner. It is in many respects inaccurate and incomplete, as is apparent from reading the opinions of the district judge and the Fifth Circuit Court of Appeals. These inaccuracies and omissions are important because they are likely to mislead the Court concerning the need for hearing this case on a petition for certiorari. Consequently, respondents are presenting their own statement of the case.

Respondents filed suit in the Federal District Court for the Northern District of Georgia seeking to enjoin petitioner from prosecuting them on criminal charges in

the Superior Court of DeKalb County, Georgia. They sought a temporary restraining order, a preliminary injunction, a permanent injunction, and declaratory relief. (R. 3-9) The complaint alleged that petitioner had instituted and was prosecuting the state criminal charges against them in bad faith. Federal jurisdiction was based on 28 USC §§1331, 1343, 2201, 2202; on 42 USC §§1983, 1988; and on the First and Fourteen Amendments to the United States Constitution. A hearing was held on the temporary restraining order motion on December 31, 1977 in the chambers of Judge William C. O'Kelley. Petitioner, a lawyer, was notified of this hearing but declined to appear. A telephone conference was held with petitioner's assistant, who was out of the state, before a decision was reached. (R. 34) A temporary restraining order was entered on January 2, 1978. (R. 34-38)

A two-day hearing on the motion for injunctive relief was held beginning on January 3, 1978. Petitioner was given the opportunity to have more time to prepare for this hearing by Judge O'Kelley, but indicated that he preferred to proceed with the hearing immediately. (R. 133) A final order granting respondents the requested injunctive relief was issued by Judge O'Kelley on June 22, 1978. Petitioner appealed, and the Fifth Circuit Court of Appeals affirmed in a January 14, 1981 opinion.

Respondents, Mr. and Mrs. Fitzgerald, are long-time personal enemies of former DeKalb County Superior Court Judge E. T. Hendon, Superior Court Judge Clyde Henley, who was Judge Hendon's law partner, and former DeKalb County Sheriff Ray Bonner. Respondents campaigned actively against all three men during the 1976 election in DeKalb County, distributing thousands of leaflets and flyers accusing them of illegal and immoral

acts. Sheriff Bonner blamed his defeat in the 1976 Republican primary on the plaintiffs. (R. 135-42; 237-39; 243) Judge Hendon called Mr. Fitzgerald a "moral degenerate" and a "congenital liar." (R. 138-39) Judge Henley testified that he was "provoked" and had considered suing Mr. Fitzgerald. (R. 297-98)

On September 1, 1976, someone claiming to be Mr. Fitzgerald called the DeKalb County Police Department and made some statements about Sheriff Bonner. A tape of this conversation was played for Mr. Bonner, on the basis of which he signed a warrant on September 2, 1976 charging Mr. Fitzgerald with making a terroristic threat against him (Ga. Code §26-1307) and with criminal libel (Ga. Code §26-2804). Mr. Fitzgerald was in police custody from September 1 until 2:00 p.m. September 2, 1976, on a charge of driving under the influence of alcohol. On September 3, 1976, Sheriff Bonner signed and caused to be substituted a new set of warrants on the criminal libel and terroristic threats charges. Mr. Fitzgerald was not arrested by Mr. Bonner's deputies until 2:00 a.m. Saturday, September 4. The delay in the arrest prevented him from making his bond until September 7, 1976, after the long Labor Day weekend. (R. 354-56) After discovering the second set of warrants Mr. Fitzgerald filed charges against Sheriff Bonner for false swearing and tampering with the evidence. But, because of a request by Judge Henley, Mr. Bonner was not arrested. (R. 306)

While the charges against Mr. Fitzgerald and the counter-charges against Sheriff Bonner were pending, Sheriff Bonner was indicted on a charge of murdering one Timothy Nix. The Fitzgeralds and their daughter testified that the defendant told them the charges against Mr. Fitzgerald would be dropped as soon as Bonner's

murder trial was over. (R. 359) Petitioner said that he only promised to drop the charges if the Bonner murder trial resulted in a conviction. (R. 254) Mr. Bonner was ultimately acquitted by a jury on the murder charge.

During the summer of 1977 Mr. and Mrs. Fitzgerald were highly critical of Judge Henley, Judge Hendon, the petitioner, Judge Robert Broome of DeKalb Superior Court, and of the Superior Court Judge who had been brought in from an adjacent circuit to handle the Bonner murder trial. In particular, they questioned all aspects of the murder trial, the disposition of a murder charge against Judge Henley's former son-in-law which had been reduced to involuntary manslaughter by Judge Broome, and the resolution of a number of criminal cases handled by Judge Hendon, when he was in private practice, before Judge Henley. (R. 344, 369-74) Mrs. Fitzgerald sent a letter to the July-August DeKalb County Grand Jury calling for an investigation of some of these matters. The Grand Jury sent two representatives to see the Fitzgeralds in August to discuss the charges. They determined that at least some of the allegations had possible merit and should be investigated further. Some of the members of the July-August Grand Jury wanted to call for a special grand jury to investigate the allegations of official wrongdoing but changed their minds when it was discovered that a majority of the Superior Court Judges would have to concur in such a proposal. (R. 423-29)

On August 24, 1977, a preliminary hearing on the charges by Mr. Bonner against Mr. Fitzgerald and by Mr. Fitzgerald against Mr. Bonner was held before Judge Tom Moran in the Magistrate's Court of DeKalb County. A transcript of this hearing was made because Mr. Fitzgerald arranged for a court reporter to be present. (R. 254)

At this hearing, after a conference participated in by Mr. Fitzgerald's lawyer, by Mr. Bonner's lawyer, and in part by Assistant District Attorney Mike Sheffield, all charges against both parties were dismissed. Mr. Sheffield not only concurred in the dismissal but stated that he was doing so because what Mr. Fitzgerald was charged with having done was not a crime. (R. 17)

Shortly after the preliminary hearing Judge Henley and Judge Hendon made inquiries in order to ascertain why the charges had been dropped against Mr. Fitzgerald. (R. 156-58; 294) Judge Hendon discussed the matter with the petitioner and told him that the case should be taken to the grand jury despite the result at the preliminary hearing. (R. 156-57; 214-15) Judge Henley joined in part of the discussion and concurred in Judge Hendon's suggestion that the matter should be referred to the grand jury. (R. 217, 218) Though the defendant decided to follow this advice, he did not refer Mr. Fitzgerald's charges against Mr. Bonner to the grand jury. At the hearing in the instant case, the defendant suggested three possible reasons for his decision: (1) that Judges Hendon and Henley had asked him to take the case to the grand jury; (2) that he thought Mr. Bonner's lawyer was unhappy with the result at the preliminary hearing; and (3) that Mr. Fitzgerald had, after the August 24, 1977, hearing, issued more leaflets that were critical of Bonner and Judges Henley and Hendon. (R. 221, 228, 262-63) Mr. and Mrs. Fitzgerald immediately filed a lawsuit against Judge Henley charging him with exercising improper influence over the defendant in deciding to prosecute Mr. Fitzgerald. (R. 363)

On August 8, 1977, Dawn Moore, the plaintiff's daughter, had a conversation with Robert Wilson, the Assistant

District Attorney charged with presenting her father's case to the grand jury. Her understanding of that conversation was that he had authorized her mother to send a letter to the grand jury. His recollection was that he had not so authorized her. (R. 281-82, 455) Judge O'Kelley found that these different versions of what occurred resulted from a genuine misunderstanding. (R. 81) In any event, Dawn Moore told her mother that someone in the District Attorney's office had said it would not hurt if she sent such a letter. The next day Dawn Moore helped her mother draft a letter to the grand jury which was accompanied by a copy of the transcript of the preliminary hearing, a copy of the complaint in the civil lawsuit filed against Judge Henley by the Fitzgeralds, and several newspaper clippings. The letters with enclosures were mailed to at least twenty members of the September-October Grand Jury on September 9 and 10, 1977. (R. 491-92) Before mailing the letters Mrs. Fitzgerald had asked one of the investigating members of the July-August Grand Jury whether it would be all right to do so. She was told that, since the District Attorney's office expressed its views on proposed indictments, there was no reason why she could not do the same. (R. 432-33)

The September-October Grand Jury heard the proposed indictment against Mr. Fitzgerald and returned a "no-bill". At that point a decision was made to try to indict both of the Fitzgeralds on the charge of embracery. It is not totally clear how this decision was reached. Robert Wilson, the Assistant District Attorney, testified that Judges Henley and Hendon first suggested to him that he consider possible embracery charges against the Fitzgeralds and spoke to him at least one other time regarding his reaction to their suggestion. (R. 545-49) The final decision to seek indictments for embracery against

both Fitzgeralds and against Mr. Fitzgerald for terroristic threats was made by the petitioner. (R. 227)

In September 1977, prior to the time that the charges against the Fitzgeralds were taken back to the grand jury, their civil case against Judge Henley came up on the motion calendar before Judge Hendon. At issue was a motion to impose sanctions on the Fitzgeralds, who were proceeding *pro se*, for having failed to appear for depositions. Mr. and Mrs. Fitzgerald argued that a protective order which they had received from Superior Court Judge Dean should be interpreted as protecting them from having to give the depositions. Mr. Fitzgerald made a motion to disqualify all judges in DeKalb County from sitting on the case, which motion was denied by Judge Hendon. Judge Hendon did not disqualify himself from hearing the case despite his admitted hatred for Mr. Fitzgerald, his admitted close friendship with Clyde Henley, and the fact that he had been named in the complaint as having participated in the alleged unlawful influencing of the District Attorney's office with respect to the disposition of the charges against Mr. Fitzgerald. (R. 143-45) At this point, Mr. Fitzgerald asked that he be allowed to withdraw the complaint without prejudice. When some discussion ensued about this motion, he moved to withdraw the complaint with prejudice. Judge Hendon granted the latter motion. (R. Pl's Exhibit #1)

Early in its term the November-December Grand Jury indicted Mr. and Mrs. Fitzgerald on twenty counts each of embracery based on the letters which Mrs. Fitzgerald sent. Prior to arraignment, Judge Hendon contacted the Dean of Emory University Law School concerning the propriety of an Emory professor representing the Fitzgeralds. (R. 148-49) They were arraigned on December

8, 1977, and scheduled to be tried, first on the calendar, before Judge Broome January 3, 1978. This is much earlier than a non-jail case would ordinarily be heard. (R. 538) Judge Broome informally agreed to disqualify himself from hearing the case because of Mr. Fitzgerald's criticism of him and arranged to bring in the same judge who had presided at the Bonner murder trial. When told that Mr. Fitzgerald would ask this judge to disqualify himself as well, Judge Broome replied that, if so, he, Judge Broome, would try the case. (R. 267-69) Shortly before his arraignment on embracery, Mr. Fitzgerald was indicted on the terroristic threats charge. He has not been arrested or arraigned on this charge, and no trial date has been set. Assistant District Attorney Wilson, who was handling the cases against plaintiffs, would have ordinarily decided whether to prosecute or *nolle prosequi* these kinds of cases without consulting with the petitioner, but in the cases pending against the Fitzgeralds he did not have this authority. (R. 272-74)

At the conclusion of a two-day hearing on respondents' motion for an injunction, Judge O'Kelley granted the requested relief. He found that the "prosecution of the Fitzgeralds has been in bad faith and for purposes of harassment with the intention of chilling their First Amendment rights." (R. 86) In reaching this ultimate conclusion he relied on at least four indicators of bad faith: (1) the interference by Judges Henley and Hendon in the petitioner's decision of whether or not to prosecute the Fitzgeralds; (2) the call by Judge Hendon to the Dean of Emory Law School concerning the representation of respondents by an Emory professor; (3) Judge Hendon's failure to recuse himself from hearing a motion in the Fitzgerald's civil case against Judge Henley; and (4) the

irregular scheduling of the Fitzgerald's criminal trial. (R. 86) The court did not find it necessary to resolve the question of whether or not any of the things that plaintiffs were charged with doing could have formed the basis of a valid criminal conviction but did indicate doubt that they could be convicted as charged. (R. 86-87) On appeal, the Fifth Circuit affirmed the district court on the ground that the "prosecution was brought for purposes of harassment and retaliation and would not have been brought but for the improper influence exerted on the prosecution by certain DeKalb judges to seek the indictments." Appendix at 25.

SUMMARY OF ARGUMENT

There is no jurisdictional problem in the instant case at all since this Court has specifically held that 42 U.S.C. §1983 is an exception to the anti-injunction statute. There is no conflict between the decision in this case and this Court's decisions in *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny. Both the district court and the Fifth Circuit specifically applied *Younger* standards to the facts of the case. Thus, no purpose would be served by granting the petition for certiorari.

ARGUMENT

Petitioner presents three arguments as justifying his petition for certiorari. The latter—that the district court never had jurisdiction because of the anti-injunction statute (28 U.S.C. §2283)—is difficult to fathom. As petitioner concedes at page 15 of his brief, *Mitchum v. Foster*, 407 U.S. 225 (1972) established that 42 U.S.C. §1983 is an exception to the anti-injunction statute. Petitioner attempts to argue that in order to come within this exception respondents must show a violation of their First

Amendment rights. This, of course, is precisely what the district judge found. See Appendix at 33. But even if he had not, §1983 is not limited to violations of the First Amendment. If respondents were prosecuted in bad faith, their Fourteenth Amendment rights were violated. Petitioner's first and second arguments appear to be virtually identical. He asserts that the decision in the instant case is inconsistent with *Younger v. Harris*, 401 U.S. 57 (1971) and its progeny. Respondents emphatically disagree and urge this Court to deny review.

The district court found the prosecution of the respondents to be "in bad faith and for purposes of harassment with the intention of chilling their First Amendment rights." (R. 86) There was abundant evidence to support this conclusion, and the Fifth Circuit affirmed in a relatively short opinion. Appendix at 23. The district court did not find it necessary to resolve the question of whether respondents could have been convicted of anything. This ruling is the key to petitioner's argument. He asserts at page 12 of his brief that unless "the State has brought the prosecution . . . without hope of obtaining a valid conviction" a federal court cannot issue an injunction against prosecution. He refers to language in *Cameron v. Johnson*, 390 U.S. 611 (1968), *Younger v. Harris*, 401 U.S. 37 (1971), *Perez v. Ledesma*, 401 U.S. 81 (1971), and *Kugler v. Helfant*, 421 U.S. 117 (1975) in support of his position. These cases will be discussed in turn.

In *Cameron* this Court considered and rejected on the merits a constitutional challenge to the picketing statute being utilized to prosecute the plaintiffs. Plaintiffs then argued that "special circumstances" nevertheless justified injunctive relief. The three judge district court expressly found "that there was no harassment, intimida-

tion or oppression" and that they were "being prosecuted in good faith." *Cameron v. Johnson*, 262 F. Supp. 873, 876 (S.D. Miss. 1966). In attempting to overturn this decision plaintiffs made several arguments: (1) that the statute was selectively enforced; (2) that plaintiffs had been entrapped; (3) that the only purpose of the statute was to stop plaintiffs' activities; and (4) that there was insufficient evidence to convict the plaintiffs as charged. It was in answer to the fourth argument that the Court in *Cameron* discussed the likelihood of securing valid convictions. 390 U.S. at 619, 621. Obviously, bringing a case that cannot succeed is a strong indicator of bad faith. But there is no suggestion in *Cameron* that such a finding is always necessary to prove the existence of bad faith. Instead, the general language talks about "special circumstances" necessary to justify injunctive relief without attempting to define what those might be. 390 U.S. at 618.

Younger v. Harris, supra, is the landmark case dealing with the circumstances in which a federal court can enjoin a pending state criminal prosecution. It established the proposition that federal courts should not ordinarily intervene in such matters, even if the statute being utilized is unconstitutional on its face. The Court made clear that the exceptions were to be limited to situations in which irreparable injury would occur and that ordinarily "bad faith and harassment" would be required. 401 U.S. at 53. No real attempt is made to define these terms, and in the very next paragraph they are referred to in the disjunctive indicating that either bad faith or harassment will suffice. 401 U.S. at 54. The Court does talk about inability to obtain a valid conviction, such as was alleged in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), as being an example of bad faith. 401 U.S. at 48. How-

ever, there is no suggestion that such is a prerequisite to a finding of bad faith.

In *Perez v. Ledesma, supra,* the Court makes the following statement:

> Only in cases of proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstance where irreparable injury can be shown is injunctive relief against pending state prosecution appropriate. 401 U.S. at 85.

Petitioner relies on this language for the proposition that inability to obtain a valid conviction is a necessary element of "bad faith." But the sentence is written in the disjunctive; either "bad faith" or "harassment" will suffice. In the instant case the district judge specifically found both "bad faith" and "harassment." Consequently, even if his bad faith finding was at odds with the language in *Perez,* the harassment finding would still support injunctive relief.

In *Kugler v. Helfant, supra,* the Court stated that "bad faith" "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." 421 U.S. at 124 n.6. This definition modifies the one given in *Perez,* in that "reasonable expectation" has replaced "without hope" and "generally" has been added as a qualification. The implication is that, while usually bad faith will involve a small likelihood of success, such will not always be the case. This reading is in line with the common sense meaning of the term, since one could well imagine that a vindictive prosecutor could use an extremely technical violation of a criminal law or a criminal statute that is almost never enforced in order to persecute rather than prosecute someone. *See, e.g.,*

Duncan v. Perez, 445 F2d 557 (5th Cir. 1971), *cert. denied*, 404 U.S. 940 (1971).

In the instant case the district judge had abundant evidence from which to find "bad faith" and "harassment," and the Fifth Circuit affirmed on appeal. Those factual findings are not challenged. The trial judge also indicated substantial doubts about the possibility of a conviction of the respondents on either of the charges. Petitioner's argument is that there must be no possibility of a conviction before injunctive relief can be granted. This Court has never said any such thing and in its latest word on the subject in *Kugler* indicated that such a finding is not even necessary to a finding of bad faith. In the instant case, the trial court and the Fifth Circuit made clear that the facts in this instance were exceptional. Far from being inconsistent with the *Younger* line of cases, the courts applied *Younger* standards to the facts that were adduced at trial. No purpose would be served by reviewing this case on certiorari.

Finally, this case is not appropriate for review because of the circumstances surrounding the petition for certiorari. Petitioner was sued individually and in his official capacity. He was defeated for reelection and left office on December 31, 1980. The attorney representing him on this petition is no longer an employee of the District Attorney of the Stone Mountain Judicial Circuit, and the new District Attorney has not joined in filing this petition. Mr. Peek has filed this petition in his individual rather than in his official capacity. There has been no indication that the new District Attorney has any interest in prosecuting the respondents. Thus, whether the case is technically moot or not, there is a strong likelihood that respondents would not be prosecuted even if petitioner's replacement were given the opportunity to do so.

CONCLUSION

For the foregoing reasons the Court should deny the petition for certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with three copies of this pleading by depositing in the United States Mail three copies in a properly addressed envelope with adequate postage thereon.

This ____ day of May, 1981.

FRANK P. SAMFORD, III
Attorney for Respondents